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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ANTHONY ROBERT MIZNER, Defendant and Appellant.	H040421 (San Benito County Super. Ct. No. CR-08-01656)

Appellant Anthony Robert Mizner appeals from the October 18, 2013 order denying his petition for resentencing pursuant to Penal Code section 1170.126.[1] Section 1170.126 was part of Proposition 36, known as "the Three Strikes Reform Act of 2012" (Proposition 36 or Act), enacted by the voters in November 2012. (See Voter Information Guide, Gen. Elec. (Nov. 6, 2012) text of Prop. 36, §§ 1, 6, 10, effective Nov. 7, 2012.) One of the purposes of Proposition 36 was to "[r]estore the Three Strikes law to the public's original understanding by requiring life sentences only when a defendant's current conviction is for a violent or serious crime." (*Id*., § 1, subd. (2).)

[1] All further statutory references are to the Penal Code unless otherwise indicated. This court granted appellant's request to take judicial notice of *People v. Mizner* (March 18, 2002, H021026) [nonpub. opn.]) (hereafter case No. H021026), an appeal from his 2000 judgment of conviction of assault (former § 245, subd. (a)(1)) and witness intimidation (§ 136.1). (See Evid. Code, §§ 452, subd. (c), 459.)

Appellant was sentenced to an indeterminate life term for possession of methamphetamine under the Three Strikes law before it was amended by Proposition 36.[2] He filed a petition for resentencing under section 1170.126, asserting that his current offense was not a violent or serious felony. (See §§ 667.5, subd. (c), 1192.7, subd. (c), see also § 1170.125; *People v. Johnson* (2015) 61 Cal.4th 674, 683 (*Johnson*) ["classification of an offense as serious or violent for purposes of resentencing is based on the law as of November 7, 2012, the effective date of Proposition 36"].) The court found that resentencing appellant "would pose an unreasonable risk of danger to public safety" (§ 1170.126, subd. (f)), which disqualified him from resentencing.[3]

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[2] Appellant was also sentenced to two one-year prior prison term enhancements, for a total term of 27 years to life.

[3] At oral argument, the Attorney General pointed out that, on June 8, 2016, the San Benito County Superior Court denied appellant's separate motion for resentencing under section 1170.18 (Proposition 47). The Attorney General suggested that the order necessarily also resolved against appellant the issue whether resentencing appellant would pose an "unreasonable risk of danger to public safety" under section 1170.126, subdivision (f). This court permitted the parties to submit supplemental briefing on the significance of the June 8, 2016 order to this appeal. In a supplemental brief, the Attorney General asserts that "both res judicata and collateral estoppel apply to this Proposition 36 appeal, based on the Proposition 47 hearing addressed to the same convictions." The brief concedes, however, that there has not been a final adjudication of appellant's motion for resentencing under section 1170.18 in that appellant is appealing the June 8, 2016 order (H043681). Thus, the People have not met an essential requirement for claim or issue preclusion. (See *DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 824-825.) Insofar as the Attorney General is claiming that the June 8, 2016 order rendered moot any appellate issue in this case, including the issue of the appropriate standard of "unreasonable risk of danger to public safety" under section 1170.126, subdivision (f), we reject that claim. (See *Consol. etc. Corp. v. United A. etc. Workers* (1946) 27 Cal.2d 859, 863; *Simi Corp. v. Garamendi* (2003) 109 Cal.App.4th 1496, 1503.) We also deny (1) the People's motion to augment the record in this appeal with the June 8, 2016 order and (2) appellant's request for judicial notice of his appeal of that order and specified portions of that appellate record (H043681). (See *Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3; *In re Zeth S.* (2003) 31 Cal.4th 396, 405.)

He now raises multiple contentions. We find no basis for reversal and affirm.[4]

I

Procedural History

In May 2013, appellant filed a petition for resentencing pursuant to section 1170.126. The petition indicated that he had been sentenced as a third strike offender and that he was serving a state prison term of at least 25 years to life based on a conviction of possession of methamphetamine (Health & Saf. Code, § 11377). The petition listed two prior strikes: arson (§ 451) and intimidating a witness (§ 136.1).

Appellant waived his right to personally appear at the hearing on his petition for resentencing.

A hearing on the petition was held on October 18, 2013. The prosecutor submitted on the probation report, which included appellant's criminal history. The report briefly described the facts underlying appellant's 1992 convictions of arson and robbery and his 2000 assault conviction, and mentioned the disciplinary violations contained in appellant's "C-file."

The probation report recommended against resentencing because appellant would pose an unreasonable risk to the community based on the entirety of his criminal record. It indicated that appellant had been in the criminal justice system since the age of 15, that appellant had 15 prior felony convictions, and that appellant had "violated his probation and parole numerous times." As to appellant's current offense, the probation report stated that "after being given the chance at Proposition 36, he failed quickly and was sent to prison." It noted that appellant had been proven "capable of violence."

As to rehabilitation efforts, the probation report stated: "[Appellant's] efforts at rehabilitation have been minimal while incarcerated. He does not appear to have

[4] Defendant also filed a petition for writ of habeas corpus, which we considered with this appeal and resolve by separate order.

completed any certificates in recent years or to be taking advantage of the resources that CDCR has to offer. [Appellant] does not appear to be making progress and there is no indication that his behavior or mindset has changed since he was last sentenced to prison."

Appellant did not appear or testify on his own behalf at the hearing on his petition. His counsel called Jay Curtis, who testified that he was "a certified criminal justice rehabilitation specialist/chemical dependency specialist." Curtis testified to the following facts.

In December 2008, Curtis worked for San Benito County Behavioral Health (Behavioral Health). Curtis conducted the intake interview of appellant, who was referred to Behavioral Health by probation. The interview involved a two-hour addiction severity index assessment, and appellant was cooperative. Curtis scheduled an appointment with appellant to develop a treatment plan to address his methamphetamine addiction and behavioral issues, such as lack of personal motivation and lack of educational and job skills, and to set some goals. Curtis was appellant's primary counselor, and he worked with appellant on relapse prevention, early-stage recovery, individual counseling, and "phone support." Appellant was Curtis's patient until appellant was discharged from the program on April 6, 2009 because appellant was being held in custody.

On April 30, 2009, Curtis wrote a letter on behalf of appellant. The letter stated that, in the early stage of the recovery process, appellant was attending his groups and did participate. But "[a]fter having some difficulty with his sobriety," appellant was upgraded to IOP level, which impliedly was a more intensive program of treatment. Appellant was attending his groups and individual counseling consistent with his treatment plan. But appellant appeared "to be having problems with personal boundaries and old friends that prompt negative actions that result in using." The letter recommended that appellant be returned to treatment rather than be placed in custody.

During the four-month period of his treatment at Behavioral Health, Curtis did not see appellant threaten or use physical force on anybody. Appellant did, however, show signs of agitation. According to Curtis, most people who abruptly stop using stimulants after a long period of using them show signs of agitation, irritability, and discontentment because they are not getting their "fix" and are not feeling well. Appellant nevertheless expressed a desire to continue treatment. Curtis had last spoken with appellant in April 2009, prior to writing the letter in support of appellant's continued treatment.

In support of the petition for resentencing, appellant's counsel proffered some prison records, which were dated between 2010 to 2012 and which generally related to his classification in prison, had them marked for identification, and discussed them in some detail. But apparently they were never admitted into evidence. Defense counsel argued that there was nothing remarkable in appellant's file to indicate that he would pose an unreasonable risk to public safety. He pointed out that, other than a 2001 disciplinary violation for a prison fight, appellant had an unremarkable prison record.

The prosecutor contended that appellant posed an unreasonable risk of danger to public safety based on his extensive criminal history, which included multiple counts of arson against multiple victims and an assault with great bodily injury. According to the prosecutor, appellant broke the nose of a woman who was going to testify against him. The prosecutor also told the court that after an arrest for violating Vehicle Code section 14601 (driving with a license suspended or revoked for certain offenses or reasons), appellant, who had been placed in the rear of a patrol vehicle, began screaming obscenities and hitting his head against the patrol vehicle cage and window.[5] He also

[5] The notice of probation violation filed before appellant was sentenced as a third strike offender alleged, inter alia, that appellant was cited for driving on a suspended license on February 5, 2009, a passenger was a parolee, and appellant was subsequently taken into custody for violating parole, but the record does not disclose appellant's post-arrest behavior.

indicated that appellant had "submitted tap water instead of urine in a recent chemical test that he took in prison." The prosecutor asserted that appellant had done almost nothing to help himself during incarceration; he had not attended substance abuse programs or participated in vocational training.

The trial court agreed that appellant had an unremarkable prison record. The court nevertheless denied appellant's petition for resentencing, concluding that he would pose an unreasonable risk of danger to public safety (§ 1170.126, subd. (f)). The court's determination was based on appellant's "extensive criminal conviction history," "the nature of the crimes committed," and "his inattentiveness to rehabilitation" in prison.

II

Discussion

A. *Unreasonable Risk of Danger to Public Safety As Defined by Section 1170.18*

1. *Appellate Contentions*

Appellant asserts that the evidence was insufficient to show that resentencing him as a second strike offender would pose "an unreasonable risk of danger to public safety" as that phrase is now defined by section 1170.18, which was part of a 2014 initiative measure approved by the voters. (See Voter Information Guide, Gen. Elec. (Nov. 4, 2014), text of Prop. 47, § 14.) Subdivision (c) of section 1170.18 provides: "*As used throughout this Code*, 'unreasonable risk of danger to public safety' means an unreasonable risk that the petitioner will commit a new violent felony within the meaning of clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667" (italics added), which specifies certain crimes.[6]

[6] Section 667, subdivision (e)(2)(C)(iv), lists the following felony offenses: "(I) A 'sexually violent offense' as defined in subdivision (b) of Section 6600 of the Welfare and Institutions Code. [¶] (II) Oral copulation with a child who is under 14 years of age, and who is more than 10 years younger than he or she as defined by Section 288a, sodomy with another person who is under 14 years of age and more than 10 years younger than he or she as defined by Section 286, or sexual penetration with another (continued)

Appellant argues that, as a matter of statutory construction, section 1170.18's narrow definition of "unreasonable risk of danger to public safety" applies to petitions filed under section 1170.126 and that definition retroactively governs our review, even though his petition for resentencing under section 1170.126 was filed and denied before section 1170.18 was enacted. We reject those contentions.

2. *Analysis*

Before the voters approved Proposition 36, the California Supreme Court observed: "One aspect of the [Three Strikes] law that has proven controversial is that the lengthy punishment prescribed by the law may be imposed not only when such a defendant is convicted of another serious or violent felony but also when he or she is convicted of any offense that is categorized under California law as a felony. This is so even when the current, so-called triggering, offense is nonviolent and may be widely perceived as relatively minor. [Citations.]" (*In re Coley* (2012) 55 Cal.4th 524, 528-529.)

Proposition 36 "reduced the punishment to be imposed with respect to some third strike offenses that are neither serious nor violent . . . ." (*Johnson*, *supra*, 61 Cal.4th at p. 679.) It also "authorizes prisoners serving third-strike sentences whose 'current' offense (i.e., the offense for which the third strike sentence was imposed) is not a serious or violent felony to petition for recall of the sentence and for resentencing as a second

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person who is under 14 years of age, and who is more than 10 years younger than he or she, as defined by Section 289. [¶] (III) A lewd or lascivious act involving a child under 14 years of age, in violation of Section 288. [¶] (IV) Any homicide offense, including any attempted homicide offense, defined in Sections 187 to 191.5, inclusive. [¶] (V) Solicitation to commit murder as defined in Section 653f. [¶] (VI) Assault with a machine gun on a peace officer or firefighter, as defined in paragraph (3) of subdivision (d) of Section 245. [¶] (VII) Possession of a weapon of mass destruction, as defined in paragraph (1) of subdivision (a) of Section 11418. [¶] (VIII) Any serious and/or violent felony offense punishable in California by life imprisonment or death."

strike case. (§ 1170.126, subd. (f); see also §§ 667, subd. (e)(1), 1170.12, subd. (c)(1).)" (*Id*. at pp. 679-680.)

To be eligible for resentencing under that section 1170.126, an inmate must be serving an indeterminate term of life imprisonment imposed pursuant to the Three Strikes law "for a conviction of a felony or felonies that are not defined as serious and/or violent" and meet other eligibility criteria. (§ 1170.126, subd. (e).) "[A]n inmate is disqualified from resentencing if any of the exceptions set forth in section 667, subdivision (e)(2)(C) and section 1170.12, subdivision (c)(2)(C) are present. (§ 1170.126, subd. (e).) In contrast to the rules that apply to [original] sentencing [under Three Strikes law as amended by Proposition 36], however, the rules governing resentencing provide that an inmate will be denied recall of his or her sentence if 'the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.' (§ 1170.126, subd. (f).)" (*Johnson*, *supra*, 61 Cal.4th at p. 682.)

Under section 1170.126, a court, in exercising its discretion to determine whether resentencing a petitioner would pose such risk of danger, "may consider: [¶] (1) The petitioner's criminal conviction history, including the type of crimes committed, the extent of injury to victims, the length of prior prison commitments, and the remoteness of the crimes; [¶] (2) The petitioner's disciplinary record and record of rehabilitation while incarcerated; and [¶] (3) Any other evidence the court, within its discretion, determines to be relevant in deciding whether a new sentence would result in an unreasonable risk of danger to public safety." (§ 1170.126, subd. (g).)

Section 1170.18, which explicitly defines the phrase "unreasonable risk of danger to public safety," was added by Proposition 47, known as "the Safe Neighborhoods and Schools Act" (Proposition 47 or the Safe Neighborhoods Act), in 2014. (Voter Information Guide, Gen. Elec., *supra*, text of Prop. 47, §§ 1, 14.) "Proposition 47 . . . reduced certain drug-related and property crimes from felonies to misdemeanors. The measure also provided that, under certain circumstances, a person who had received

a felony sentence for one of the reduced crimes could be resentenced and receive a misdemeanor sentence." (*People v. Morales* (2016) 63 Cal.4th 399, 403.)

Under section 1170.18, eligible prisoners, who are currently serving a sentence for a felony conviction and who would have been guilty of a misdemeanor if Proposition 47 had "been in effect at the time of the offense," "may petition for a recall of sentence . . . to request resentencing in accordance with [specified sections] as those sections have been amended or added by [that] act." (§ 1170.18, subd. (a); see § 1170.18, subd. (i) [section inapplicable to certain persons].) After receiving a petition for recall of sentence under section 1170.18 and determining that the petitioner meets the criteria for filing such petition, the court must recall the petitioner's felony sentence and resentence the petitioner "to a misdemeanor pursuant to [specified sections as], those sections have been amended or added by this act, unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." (§ 1170.18, subd. (b).)

Like section 1170.126, section 1170.18 states that, "[i]n exercising its discretion, the court may consider all of the following: [¶] (1) The petitioner's criminal conviction history, including the type of crimes committed, the extent of injury to victims, the length of prior prison commitments, and the remoteness of the crimes. [¶] (2) The petitioner's disciplinary record and record of rehabilitation while incarcerated. [¶] (3) Any other evidence the court, within its discretion, determines to be relevant in deciding whether a new sentence would result in an unreasonable risk of danger to public safety." (§ 1170.18, subd. (b).) Unlike section 1170.126, section 1170.18 contains an explicit, narrow definition of the phrase "unreasonable risk of danger to public safety." (§ 1170.18, subd. (c).)

The issue whether section 1170.18's explicit, narrow definition of "unreasonable risk of danger to public safety" applies to resentencing proceedings under section 1170.126 is currently pending before the California Supreme Court.[7] We recognize that section 1170.18, subdivision (c), appears to define the phrase "unreasonable risk of danger to public safety" for the entire Penal Code. But we are also cognizant of the cardinal rules of statutory interpretation, which "apply equally to the interpretation of

[7] The California Supreme Court has granted review in two cases (*People v. Valencia* (2014) 232 Cal.App.4th 514, review granted Feb. 18, 2015, S223825; *People v. Chaney* (2014) 231 Cal.App.4th 1391, review granted Feb. 18, 2015, S223676) and indicated on its website that they pose the following issue: "Does the definition of 'unreasonable risk of danger to public safety' (Pen. Code, § 1170.18, subd. (c)) under Proposition 47 ('the Safe Neighborhoods and Schools Act') apply retroactively to resentencing under the Three Strikes Reform Act of 2012 (Pen. Code, § 1170.126)?" (<http://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc_id=2097984&doc_no=S223825> [as of Dec. 21, 2016]; <http://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc_id=2097269&doc_no=S223676> [as of Dec. 21, 2016].) The court has also granted review in a number of other cases that are being held pending resolution of those lead cases. (*People v. Cordova* (2016) 248 Cal.App.4th 543 [holding for lead case], review granted on August 31, 2016, S236179; *People v. Florez* (2016) 245 Cal.App.4th 1176 [same], review granted June 8, 2016, S234168; *People v. Myers* (2016) 245 Cal.App.4th 794 [same], review granted May 25, 2016, S233937; *People v. Garcia* (2016) 244 Cal.App.4th 224 [same], review granted April 13, 2016, S232679; *People v. Lopez* (2015) 236 Cal.App.4th 518 [same], review granted July 15, 2015, S227028; *People v. Sledge* (2015) 235 Cal.App.4th 1191 [same], review granted July 8, 2015, S226449; *People v. Guzman* (2015) 235 Cal.App.4th 847 [same], review granted June 17, 2015, S226410; *People v. Davis* (2015) 234 Cal.App.4th 1001 [same], review granted June 10, 2015, S225603; *People v. Crockett* (2015) 234 Cal.App.4th 642 [same], review granted May 13, 2015, S225198; *People v. Rodriguez* (2015) 233 Cal.App.4th 1403 [same], review granted April 29, 2015, S225047; *People v. Aparicio* (2015) 232 Cal.App.4th 1065 [same], review granted March 25, 2015, S224317; *People v. Payne* (2014) 232 Cal.App.4th 579 [same], review granted March 25, 2015, S223856; *People v. Superior Court (Burton)* (2015) 232 Cal.App.4th 1140 [same], review granted March 25, 2015, S223805; *People v. Superior Court (Williams)* (2015) 232 Cal.App.4th 1149 [same], review granted March 25, 2015, S223807.)

voter initiatives. (*Whitman v. Superior Court* (1991) 54 Cal.3d 1063, 1072.)" (*Horwich v. Superior Court* (1999) 21 Cal.4th 272, 276.)

" The fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law. [Citations.] In order to determine this intent, we begin by examining the language of the statute. [Citations.] But '[i]t is a settled principle of statutory interpretation that language of a statute should not be given a literal meaning if doing so would result in absurd consequences which the [legislative body] did not intend.' [Citations.] Thus, '[t]he intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act.' [Citation.] Finally, we do not construe statutes in isolation, but rather read every statute 'with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness.' [Citation.]" (*People v. Pieters* (1991) 52 Cal.3d 894, 898-899.)

Although section 1170.126 and section 1170.18 have somewhat parallel resentencing provisions, from which we may infer that the latter was modeled on the former, they are aimed at entirely different criminal populations. Section 1170.126 is generally aimed at repeat felony offenders who have two or more serious and/or violent felony convictions and are presently serving a sentence as a third strike offender for a felony that is not a violent or serious felony. In contrast, section 1170.18 focuses on the apparently much less dangerous inmates who are currently serving a sentence for a felony offense that under current law would be a misdemeanor.

Section 1170.126 as enacted gave courts considering a petition for recall of sentence broad discretion to decline to resentence on public safety grounds, as evidenced by the court's statutory authority to consider any relevant evidence (§ 1170.126, subd. (g)(3)) and the absence of any other statutory limitation. As the section was enacted, the only restriction on the court's exercise of discretion in determining whether "resentencing the petitioner would pose an unreasonable risk of danger to public safety" (§ 1170.126,

subd. (f)) was the inherent one, namely that judicial discretion must be exercised within the bounds of reason under the applicable law and the relevant facts. (See *People v. Williams* (1998) 17 Cal.4th 148, 162.) Such very broad discretion is consistent with the target population, which consists of repeat felony offenders who have two or more prior serious and/or violent felony convictions.

In contrast, judicial discretion to decline to resentence on public safety grounds under section 1170.18 is significantly constrained by its very narrow definition of "unreasonable risk of danger to public safety" (§ 1170.18, subd. (c)), which makes sense since the target population consists of persons who would have been convicted of mere misdemeanors if Proposition 47 had been in effect at the time of the offenses. In our view, a number of circumstances suggest that section 1170.18's language indicating that its definition applies "throughout this Code," i.e., the Penal Code, may have been a drafting error. First, the phrase "unreasonable risk of danger to public safety" is used in only two Penal Code sections: section 1170.126 and section 1170.18. Second, Proposition 47 amended many code sections, and it could have easily amended section 1170.126 as well if that had been the drafters' true intent. Third, nothing in the Voter Information Guide (not Proposition 47's express statements of legislative intent, not the Legislative Analyst's analysis, and not the arguments in favor of and against the proposition) informed voters that section 1170.18's very narrow definition of "unreasonable risk of danger to public safety" would impact implementation of Proposition 36, which voters had approved years earlier. Fourth, when Proposition 47 was approved in November 2014, the window period for filing a petition for resentencing under section 1170.126 was virtually closed. That window period expired on November 7, 2014, except as to petitioners able to establish good cause for untimely

filing.[8] Since section 1170.18 makes multiple references to "unreasonable risk of danger to public safety," the drafters may have meant throughout this code *section*.

In any case, giving a literal meaning to section 1170.18's innocuous phrase "[a]s used throughout this Code" (which was buried in the lengthy and complicated text of Proposition 47) would result in absurd consequences that the voters did not actually intend. The 2012 ballot materials explained to the voters that, if Proposition 36 were approved, a court "would be required to resentence eligible offenders unless it determines that resentencing the offenders would pose an unreasonable risk to public safety." (Voter Information Guide, Gen. Elec., *supra*, Analysis of Prop. 36 by Legis. Analyst, p. 50.) The voters were informed, however, that "[i]n determining whether an offender poses such a risk, the court could consider any evidence it determines is relevant, such as the offender's criminal history, behavior in prison, and participation in rehabilitation programs." (*Ibid*.) The ballot materials assured the voters that "[o]ffenders whose requests for resentencing are denied by the courts would continue to serve out their life terms as they were originally sentenced." (*Ibid*.) The rebuttal to the argument against Proposition 36 reassured voters that "Prop. 36 prevents dangerous criminals from being released early." (Voter Information Guide, Gen. Elec., *supra*, rebuttal to argument against Prop. 36, p. 53.) As enacted, section 1170.126 afforded courts broad discretion to find that resentencing would pose an unreasonable risk of danger to public safety. (See *People v. Esparza* (2015) 242 Cal.App.4th 726, 739 (*Esparza*).)

As we have said, nothing in the ballot materials for Proposition 47 alerted voters that the broad judicial discretion to deny resentencing under section 1170.126 on public

[8] A petition for recall of sentence under section 1170.126 was generally required to be filed "within two years after the effective date of the act that added" section 1170.126 (§ 1170.126, subd. (b)) and that effective date was November 7, 2012. (Voter Information Guide, Gen. Elec., *supra*, text of Prop. 36, § 10; see Cal. Const., art. II, § 10, subd. (a).)

safety grounds would be radically reduced if they approved Proposition 47. Voters were not informed that application of section 1170.18's narrow definition of the phrase "an unreasonable risk of danger to public safety" to petitions filed under section 1170.126 would erect an exceedingly high bar and fundamentally alter the limited lenity extended by Proposition 36. In our view, giving section 1170.18's phrase "[a]s used throughout this Code" its literal meaning would lead to absurd consequences that the voters never intended. Consequently, we conclude that section 1170.18's definition of "unreasonable risk of danger to public safety" does not govern resentencing proceedings under section 1170.126.

In light of the foregoing conclusion, we do not reach appellant's further contention that, because the order denying his petition for resentencing under section 1170.126 was "not yet final" when the voters approved Proposition 47 on November 4, 2014, section 1170.18's definition of "unreasonable risk of danger to public safety" also retroactively governs resolution of this appeal from that order.

B. *Sixth Amendment Rights*

1. *No Right to Jury Trial on Petition for Resentencing Filed under Section 1170.126*

Appellant asserts that he was constitutionally entitled to a jury determination regarding whether resentencing him "would pose an unreasonable risk of danger to public safety." (§ 1170.126, subd. (f).) He suggests that in finding that resentencing would pose such risk, "the court increased both the maximum and minimum punishment to which he could be subjected."

The Sixth Amendment to the United States Constitution provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." The Sixth Amendment right to jury trial is applicable to the states through the due process clause of the Fourteenth Amendment to the United States Constitution. (*Duncan v. State of Louisiana* (1968) 391 U.S. 145, 149.)

The due process clause of the Fourteenth Amendment, together with the Sixth Amendment right to a jury trial, "entitle a criminal defendant to 'a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.' [Citations.]" (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 477 (*Apprendi*).) *Apprendi* held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Id*. at p. 490, see *id*. at p. 494 & fn. 19 [any factual finding that "expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict" is the "the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict"].) "[T]he essential Sixth Amendment inquiry is whether a fact is an element of the crime. When a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury." (*Alleyne v. United States* (2013) 570 U.S. __, __, [133 S.Ct. 2151, 2162] (*Alleyne*).)

It is now clear that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.* [Citations.]" (*Blakely v. Washington* (2004) 542 U.S. 296, 303-304.) "In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (*Ibid*.) In addition, the United States Supreme Court has now determined that "any fact that increases the mandatory minimum is an 'element' that must be submitted to the jury." (*Alleyne, supra,* 570 U.S. at p. __ [133 S.Ct. at p. 2155]; see *id*. at pp. __, __ [133 S.Ct. at pp. 2159-2163].)

It is undisputed that appellant's guilty plea to possession of methamphetamine in violation of Health and Safety Code section 11377, subdivision (a), and his admissions of prior strikes within the meaning of the Three Strikes law (§ 667, subd. (b)-(i)), subjected him to sentencing as a third strike offender at the time he was originally sentenced.

Appellant's argument wrongly presupposes that section 1170.126 mandates plenary resentencing. Rather, under that section, an eligible petitioner under section 1170.1126 is not entitled to resentencing, and the petitioner is not resentenced, if the court "determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." (§ 1170.126, subd. (f).) Section 1170.126 "does not provide for wholesale resentencing of eligible petitioners." (*People v. Superior Court* (*Kaulick*) (2013) 215 Cal.App.4th 1279, 1304 (*Kaulick*).)

As observed in *Kaulick*: "[S]ection 1170.126, subdivision (f) does not state that a petitioner eligible for resentencing has his sentence immediately recalled and is resentenced to either a second strike term (if not dangerous) or a third strike indeterminate term (if dangerousness is established). Instead, the statute provides that he 'shall be resentenced' to a second strike sentence 'unless the court . . . determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.' In other words, dangerousness is not a factor [that] enhances the sentence imposed when a defendant is resentenced under the Act; instead, dangerousness is a hurdle which must be crossed in order for a defendant to be resentenced at all. If the court finds that resentencing a prisoner would pose an unreasonable risk of danger, the court does not resentence the prisoner, and the petitioner simply finishes out the term to which he or she was originally sentenced." (*Kaulick*, *supra*, 215 Cal.App.4th at pp. 1302-1303, fn. omitted.) Thus, a court's determination that resentencing a petitioner "would pose an unreasonable risk of danger to public safety" (§ 1170.126, subd. (f)) merely "removes the inmate from the scope of an act of lenity on the part of the electorate to which he or she is not constitutionally entitled." (*Esparza*, *supra*, 242 Cal.App.4th at p. 740; *People v. Bradford* (2014) 227 Cal.App.4th 1322, 1334-1336; *Kaulick*, *supra*, at pp. 1304-1305.)

In *Dillon v. United States* (2010) 560 U.S. 817 (*Dillon*), the United States Supreme Court held that the sentence-modification proceedings authorized by title 18 United States Code, section 3582(c)(2) (section 3582(c)(2)), which authorizes a district

court to reduce an otherwise final sentence consistent with applicable policy statements of the Sentencing Commission when the commission makes an amendment of the federal Sentencing Guidelines retroactive (*Dillon, supra,* at p. 821), did not "implicate the Sixth Amendment right to have essential facts found by a jury beyond a reasonable doubt." (*Id*. at p. 828.) This is because the original sentence was taken "as given" and "any facts found by a judge at a [section] 3582(c)(2) proceeding [did] not serve to increase the prescribed range of punishment . . . ." (*Ibid*.) The court characterized the federal law as "a congressional act of lenity intended to give prisoners the benefit of later enacted adjustments to the judgments reflected in the Guidelines." (*Ibid*.) Sentence modification proceedings under section 3582(c)(2) were not constitutionally compelled. (*Ibid*.) Section 3582(c)(2) did not provide for plenary resentencing. (See *id*. at p. 826.)

Similarly, section 1170.126 is an act of legislative lenity and is not constitutionally compelled. Section 1170.126 does not entitle all persons serving an indeterminate term of life imprisonment imposed under the Three Strikes law for conviction of a nonviolent, nonserious felony to plenary resentencing. Only where a court does not find that resentencing a petitioner who otherwise meets the statutory requirements would pose an unreasonable risk of danger to public safety is the petitioner entitled to be resentenced on a nonviolent, nonserious felony conviction as a second strike offender, which constitutes a sentence reduction. (See *Johnson, supra,* 61 Cal.4th at pp. 688 [eligibility for resentencing "evaluated on a count-by-count basis"]; 695 [person may be eligible for resentencing on a nonserious, nonviolent count "despite the presence of another count that is serious or violent"].)

In this case, the court determined that resentencing appellant "would pose an unreasonable risk of danger to public safety" (§ 1170.126, subd. (f)) and, consequently, the court did not resentence appellant. The court did not retroactively modify appellant's sentence upward. Rather, his original sentence simply remained intact.

Appellant fails to establish that he had any constitutional right to a jury determination of the threshold question whether resentencing him "would pose an unreasonable risk of danger to public safety." (§ 1170.126, subd. (f).)

2. *No Right to Confrontation*

Appellant argues that "the factfinding [*sic*] involved in adjudicating [his] dangerousness under section 1170.126 must proceed within the parameters of the Sixth Amendment" right to confrontation. He contends that his constitutional right to confront witnesses against him was violated by the admission of probation reports and prison disciplinary records, which he asserts contained testimonial hearsay upon which the trial court improperly relied.

The confrontation clause of the Sixth Amendment to the United States Constitution provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." It is applicable to the states through the Fourteenth Amendment to the United States Constitution. (*Pointer v. Texas* (1965) 380 U.S. 400, 403.)

In *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*), which appellant cites, the United States Supreme Court held that "[t]estimonial statements of witnesses absent from trial [can be] admitted [at trial] only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." (*Id*. at p. 59, fn. omitted, see *id*. at p. 68.) In *Crawford*, the Supreme Court "reject[ed] the view that the Confrontation Clause applies of its own force only to in-court testimony, and that its application to out-of-court statements introduced at trial depends upon 'the law of Evidence for the time being.' [Citations.]" (*Id*. at pp. 50-51.) The court stated that "[t]he Constitution prescribes a procedure [namely, confrontation] for determining the reliability of testimony in criminal trials, and we, no less than the state courts, lack authority to replace it with one of our own devising." (*Id*. at p. 67.) "A witness's testimony against a defendant is thus inadmissible [in the criminal trial] unless the

witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination. [Citation.]" (*Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305, 309 (*Melendez-Diaz*).)

Even assuming that appellant did not forfeit his Sixth Amendment confrontation claim (see *Melendez-Diaz, supra,* 557 U.S. at p. 314, fn. 3 [right to confrontation may be waived by failure to object to the offending evidence]), we reject it. We have already concluded that a judicial finding that resentencing a petitioner under section 1170.126 would pose an unreasonable risk of danger to public safety is not a fact that must be regarded as an element of the offense. Rather, the finding is a threshold determination that statutorily disqualifies a petitioner from postjudgment resentencing extended to some offenders as a matter of legislative lenity. Appellant has not cited any authority supporting his claim that he had a constitutional right to confrontation with respect to that threshold determination.

Even at sentencing a defendant does not ordinarily have a constitutional right of confrontation where *Apprendi supra*, 530 U.S. 466 does not apply. (See *United States v. Tucker* (1972) 404 U.S. 443, 446 (*Tucker*) [judges may exercise sentencing discretion through "an inquiry broad in scope, largely unlimited either as to the kind of information [they] may consider, or the source from which it may come"]; *Williams v. New York* (1949) 337 U.S. 241, 246 ["But both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law. [Fn. omitted.]"], 252 [due process clause does not render "a sentence void merely because a judge gets additional out-of-court information to assist him in the exercise of this awesome power of imposing the death sentence"]; see also *Alleyne, supra,* 570 U.S. at p. __ [133 S.Ct. at p. 2163, fn. 6, but cf. *Apprendi supra,* at p. 490.) Absent an *Apprendi* problem, "[t]he [United States Supreme] Court's 2004 decision in

Crawford v. Washington, pertaining to the use of hearsay at trial, did not change the traditional availability of hearsay at sentencing." (6 LaFave et al., Crim. Proc. (4th ed. 2015) Due Process § 26.4(f), p. 988, fns. omitted.)

Appellant fails to establish that he had a Sixth Amendment right of confrontation at the hearing on his petition for resentencing under section 1170.126. *State v. Rodriguez* (Minn. 2008) 754 N.W.2d 672 (*Rodriguez*), which appellant cites, does not aid him. In an earlier appeal, an appellate court had concluded that defendant Rodriguez's Sixth Amendment rights had been " violated '[b]ecause the district court imposed a sentence that is an upward durational departure from the presumptive sentence based solely on judicially found facts.' [Citation.]" (*Id.* at p. 676.) The earlier appellate decision had "reversed and remanded for resentencing in accordance with *Blakely v. Washington* 542 U.S. 296 (2004). [Citation.]" (*Ibid.*) "On remand, a *jury* sentencing trial was held to determine the existence of aggravating factors supporting an upward sentencing departure." (*Id.* at pp. 676-677, italics added.) The Supreme Court of Minnesota concluded that "[b]ecause cross-examination is a core component of a defendant's right to a jury trial, . . . the right of confrontation guaranteed by the Sixth Amendment applies in *jury* sentencing trials." (*Id.* at p. 680, fn. omitted, italics added.) The court held that "the admission at [the defendant's] *jury* sentencing trial of [his coconspirator's] recorded police statements violated [the defendant's] confrontation rights under the Sixth Amendment." (*Id.* at p. 682, italics added.)

Unlike the proceedings at issue in *Rodriguez*, the proceedings under section 1170.126 do not constitute a "jury sentencing trial" intended to rectify an *Apprendi* problem that arose because judicial fact finding had exposed a defendant to punishment greater than authorized by a jury verdict of guilty or the defendant's plea. Postjudgment resentencing proceedings under section 1170.126 are purely statutory, and no Sixth Amendment right to confrontation applies.

C. *Sufficiency of the Evidence*

Appellant maintains that the evidence was insufficient to show that resentencing him to a second strike sentence on his current crime would pose an unreasonable risk of danger to public safety. He also argues that the People had the burden of showing such risk by proof beyond a reasonable doubt.

a. *Burden of Proof*

Appellant recognizes that an appellate court has held that the People have the burden to prove such risk of danger by a preponderance of the evidence. (*Kaulick*, *supra*, 215 Cal.App.4th at pp. 1292, 1301-1305.) He now asserts, however, that *Kaulick* was wrongly decided. Even assuming this assertion was not waived by the failure to raise it below,[9] we reject it.

The People's burden to prove a defendant is guilty of a crime beyond a reasonable doubt (see *Apprendi*, *supra*, 530 U.S. at pp. 476-477) has no application to the statutory resentencing procedure under section 1170.126, of which an eligible prisoner may avail himself.[10] As we have concluded, a statutory condition of such resentencing is the absence of a judicial determination that "resentencing the petitioner would pose an unreasonable risk of danger to public safety." (§ 1170.126, subd. (f).) A court's determination that resentencing a petitioner under section 1170.126 would pose such risk

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[9] At the hearing on the resentencing petition, defense counsel indicated that the People had the burden of proof by a preponderance of the evidence.

[10] Appellant pleaded guilty to the current crime. By entering a plea of guilty to a violation of Health and Safety Code, section 11377, subdivision (a), appellant stood convicted of the crime. "[A] guilty plea constitutes an admission of every element of the offense charged and constitutes a conclusive admission of guilt. (*In re Hawley* (1967) 67 Cal.2d 824, 828.) It waives a trial and obviates the need for the prosecution to come forward with any evidence. (*People v. Martin* (1973) 9 Cal.3d 687, 693-694; *People v. Rogers* (1957) 150 Cal.App.2d 403.) A guilty plea thus concedes that the prosecution possesses legally admissible evidence sufficient to prove defendant's guilt beyond a reasonable doubt." (*People v. Turner* (1985) 171 Cal.App.3d 116, 125; see *People v. Ward* (1967) 66 Cal.2d 571, 574-575.)

is not a retrial of the charged offense and does not expand punishment for the offense beyond the prescribed range. (See *Apprendi*, *supra*, at p. 490; *Alleyne*, *supra*, 570 U.S. at pp. __, __-__ [133 S.Ct. at pp. 2155, 2159-2163].) Such finding merely disqualifies the petitioner from retroactive relief under section 1170.126 and leaves the petitioner subject to his or her original sentence.

Since section 1170.126 does not specify the burden of proof on the issue of whether "resentencing the petitioner would pose an unreasonable risk of danger to public safety" (§ 1170.126, subd. (f)), we must look to other law. As was observed in *Kaulick*, *supra*, 215 Cal.App.4th at p. 1305, Evidence Code section 115 provides in part: "*Except as otherwise provided by law*, the burden of proof requires proof by a preponderance of the evidence." (Italics added.) " 'Burden of proof' means the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court." (Evid. Code, § 115.) "Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." (Evid. Code, § 500.) Accordingly, under the Evidence Code, where the People assert that resentencing a petitioner under section 1170.126 "would pose an unreasonable risk of danger to public safety" (§ 1170.126, subd. (f)), the People have the burden of proof by a preponderance of the evidence.

b. *Substantial Evidence Supports Finding*

Appellant contends that the evidence was insufficient to support the court's finding that resentencing him would pose an unreasonable risk of danger to public safety, even under a preponderance of the evidence standard. He suggests that his most recent crime of which he was convicted (possession of methamphetamine) does not cause or threaten significant harm to others, his prior convictions are remote in time, the "only evidence" that he "acted violently" toward "another person subsequent to 1999 was a

prison record stating that in 2001 [he] struck another inmate," and any risk that he would commit violent crime in the future has diminished because he is older now.

Appellant's argument takes too narrow a view of the standard of "unreasonable risk of danger to public safety" under section 1170.126, subdivision (f), and it neglects the standard of review. We assume that the abuse of discretion standard, which encompasses the substantial evidence test (*Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711-712), applies to the court's determination that resentencing poses a disqualifying risk of danger rather than any lesser standard. (See *Kaulick*, *supra*, 215 Cal.App.4th at p. 1306, fn. 29 ["A trial court's decision to refuse to resentence a prisoner [under section 1170.126], based on a finding of dangerousness, is somewhat akin to a decision denying an inmate parole."]; cf. *In re Shaputis* (2011) 53 Cal.4th 192, 209-210 ["some evidence" standard of review applicable to denial of parole is more deferential than substantial evidence review, and it may be satisfied by a lesser evidentiary showing].)

Since appellant is asserting that no substantial evidence supports the court's determination that resentencing poses a disqualifying risk of danger, we review the record in the light most favorable to that determination and evaluate whether it is supported by substantial evidence. (Cf. *People v. Turner* (2004) 34 Cal.4th 406, 425.) Evidence is substantial if it is reasonable, credible and of solid value. (*Ibid*.) If the circumstances reasonably justify a trier of fact's factual finding, reversal is not warranted even if the circumstances could have been reasonably reconciled with a contrary finding. (Cf. *People v. Cravens* (2012) 53 Cal.4th 500, 508.)

Appellant's lengthy criminal history reflects entrenched recidivism. The probation report filed September 5, 2013 sets forth his extensive criminal history, which began in 1974 when he was a juvenile. His adult criminal record includes numerous convictions,

including 15 felonies[11] and a multitude of misdemeanors, and extensive time spent in custody. He violated probation or parole numerous times.

The probation report disclosed that in 1992, appellant was convicted of seven counts of arson and a count of burglary and sentenced to a six-year prison term. (§§ 451, subd. (c), 459.) It described those arson offenses as "particularly egregious" because they affected the entire community. According to the report, in 1991 appellant "set fire to a series of businesses in downtown Hollister, which resulted in tremendous financial loss to numerous victims." Appellant was found in possession of property taken from a victim's shop.

The probation report reflects that, after appellant had served his time in prison for the 1991 offenses and before he committed new felony offenses in 1999, he was returned to the CDC for violations of parole in 1994, 1995, 1997, and 1998. During that same time period, he was also convicted of four misdemeanors.

The probation report indicates that in 1999 appellant was convicted of a misdemeanor violation of former Vehicle Code section 14601.1 (driving while license

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[11] Appellant's 15 felony convictions as an adult, which span the period of 1977 to 2008, include two robbery convictions (former § 459), three convictions of receiving stolen property (former § 496), seven convictions of arson (former section 451, subd. (c)), an assault conviction (former § 245, subd. (a)(1)), a witness intimidation conviction (§ 136.1, subd. (c)(1)), and a conviction of possession of methamphetamine (former Health & Saf. Code, § 11377, subd. (a)). His adult misdemeanor convictions were numerous and apparently included multiple violations of section 488 (petty theft), violation of former section 459 (burglary), violation of former section 417 (drawing, exhibiting or using a firearm or deadly weapon), violation of former section 137, subd. (b) (inducing false testimony), multiple violations of former section 594 (vandalism), multiple convictions of former section 496 (receiving stolen property), violation of former Health and Safety Code section 11350 (unlawful possession of controlled substance), violation of former section 4600 (destroying or injuring jail or prison property), violation of former section 457.1, subdivision (h) (failure to register as convicted arsonist), and violation of former Vehicle Code section 14601.1 (driving while license suspended or revoked).

suspended or revoked). On July 2, 1999, he was placed on court probation and a probationary jail term was imposed.

According to the probation report, on July 30, 1999, appellant became irate with a friend of his mother and assaulted that friend while she was driving him to the county jail. Appellant kicked the victim with his left leg on the right side of her head, by her ear, which caused her head to hit the steering wheel. The victim sustained "a one-inch laceration on the right side of the bridge of her nose." "Her nose was swollen and both of her eyes were turning black." The probation report does not indicate that the assault resulted in a broken nose or that the assault was committed to dissuade the victim from testifying against him.

In 2000, appellant was convicted of assault (former § 245, subd. (a)(1)) and witness intimidation (§ 136.1, subd. (c)(1)). According to the probation report, appellant was ultimately resentenced, impliedly under the Three Strikes law, to 10 years in prison for those crimes, after "it was determined that his prior arson convictions only counted as one strike."

On October 15, 2008, appellant pleaded guilty to possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)). The trial court placed appellant on probation for three years under the provisions of an earlier Proposition 36,[12] requiring him to participate in and successfully complete a drug treatment program.

Appellant was again found to have violated parole.

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[12] This proposition was an initiative measure approved by the voters years before the 2012 Proposition 36. "The Substance Abuse and Crime Prevention Act of 2000 . . . , which the voters of California enacted through Proposition 36, requires courts to order probation and community-based drug treatment rather than incarceration for certain criminal offenders who commit ' "nonviolent drug possession offense[s]" ' . . . . (Pen.Code, § 1210, subd. (a).)" (*People v. Guzman* (2005) 35 Cal.4th 577, 583, fn. omitted.)

A notice of probation violation, filed on April 24, 2009, alleged that appellant had violated probation by failing to report to two scheduled drug testing appointments with a probation officer, testing positive for methamphetamine on January 13, 2009, receiving a citation for driving on a suspended license on February 5, 2009, having contact with a known parolee (the passenger in the vehicle driven on February 5, 2009), admittedly using methamphetamine on March 9, 2009, testing positive for methamphetamine on April 15, 2009, and violating parole. On June 3, 2009, appellant admitted violating probation.

The probation report indicated that the probation officer had reviewed appellant's "C-file" from prison. In 2012, appellant received a disciplinary violation for refusing to submit to a urine analysis; the sample he submitted contained tap water rather than urine. In 2010, he received a disciplinary violation for not turning in a homework assignment as directed. In 2006, he received a disciplinary violation for failing to attend a substance abuse program and his job assignment. In 2005, he received a disciplinary violation for disruptive behavior. In 2004, he received a disciplinary violation for disobeying orders. In 2001, he received several disciplinary violations, including a violation for striking an inmate with his fists. In 2000, appellant received a disciplinary violation for failing to report to his assigned class on numerous occasions. The probation report described appellant's attempts at rehabilitation as "minimal."

Appellant attempts to downplay the seriousness of his felony conviction of possession of methamphetamine, which apparently occurred while he was on parole and followed a lifetime of offenses and repeated incarceration. The current felony followed his service of a significant prison sentence for assault and witness intimidation. Although he was granted probation for his most recent felony, he violated probation by repeatedly using methamphetamine. Use of methamphetamine has been associated with paranoia, hostility, and aggression or violence. (See *People v. Martinez* (2009) 47 Cal.4th 399, 413; *People v. Kipp* (2001) 26 Cal.4th 1100, 1119.) Appellant overlooks the connection

between illegal drug use and criminal activity, including crimes of violence. (See *Harmelin v. Michigan* (1991) 501 U.S. 957, 1002-1003 (opn. of Kennedy, J., concurring in part and concurring in the judgment).)

We conclude that, based on the record before it, the trial court did not abuse its discretion in determining that resentencing appellant posed an unreasonable risk of danger to public safety in light of his lengthy record of criminal behavior, which included violent behavior, his multiple violations of probation and parole, his continuing criminality despite extensive incarceration and the opportunity for drug treatment, and the lack of any serious effort by appellant to rehabilitate himself while in prison. The determination was supported by substantial evidence.

D. *Due Process*

1. *Background to Appellant's Claim*

Appellant asserts that denial of his petition for resentencing violated due process because, in ruling on the petition, court relied on false information concerning his criminal history that was contained in the probation report—specifically, a statement indicating that his prior assault conviction was a "strike" within the meaning of the Three Strikes law. He also complains that the prosecutor made untrue statements about his assault conviction, which "ostensibly corroborated the probation report's assertion [that] the assault was a prior strike."

The probation report actually stated that appellant was sentenced under the Three Strikes law "due to having *two* prior strike convictions" (italics added), but then immediately listed three offenses: "one count of 451(c) P.C., a felony, in case #3663 and one count of 245(a)(1) P.C. and one count of 136.1 (c)(1) P.C., felonies, in case # CRF99-37045."

Appellant's convictions of arson (§ 451, subd. (c)) and witness intimidation (§ 136.1, subd. (c)(1)) are clearly strikes. (See § 1192.7, subds. (c)(14) [arson], (c)(37) "intimidation of victims or witnesses, in violation of Section 136.1"].) The factual

description of the assault offense in the probation report did not indicate that the defendant had used a deadly weapon or inflicted "great bodily injury," which is necessary to make an offense of assault by means of force likely to produce great bodily injury a strike. (See §§ 667.5, subd. (c)(8) ["[a]ny felony in which the defendant inflicts great bodily injury on any person other than an accomplice"], 1192.7, subd. (c)(8) ["any felony in which the defendant personally inflicts great bodily injury on any person, other than an accomplice"]; CALCRIM No. 875 ["*Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm."]; *People v. Covino* (1980) 100 Cal.App.3d 660, 668 (*Covino*).)

Appellant's written response to the probation report that he filed below did not address whether his assault conviction was a strike. Appellant now maintains that the assault conviction was not a strike because it did not involve a deadly weapon and there was no finding of serious bodily harm. He also asserts that the prosecutor's comments regarding the assault were untrue.

Neither the probation report prepared for the hearing on appellant's petition for resentencing nor our 2002 opinion (case No. H021026), of which we have taken judicial notice, stated that the assault victim's nose was broken. Our 2002 opinion indicated that appellant was supposed to be at the jail by 8:00 p.m. on the date of the assault and that appellant became angry with the victim when she did not speed or go through stoplights as he directed. Our 2002 opinion reflected that appellant's witness intimidation conviction was based on appellant's threat, which he made to his mother during a telephone call from jail: "If [the assault victim] presses charges, she had better get the fuck off the face of the earth . . . ."

2. *Forfeiture Rule*

At the time of the hearing on appellant's petition, his counsel did not contradict or object to the prosecutor's statements, made in argument, that appellant had "assault[ed]

someone with great bodily injury," that appellant had broken the nose of the assault victim, and that appellant assaulted her "because she was going to testify against him."

The People's first argument is that appellant forfeited his due process claim by failing to object below. Appellant maintains that this court may nevertheless address his claim because the issue of whether an offense qualifies as a violent or serious felony is a question of law. He also contends that, since the prosecutor engaged in misconduct by misrepresenting his criminal record, we should reach his due process claim.

"The forfeiture rule generally applies in all civil and criminal proceedings. [Citations.] The rule is designed to advance efficiency and deter gamesmanship." (*Keener v. Jeld-Wen, Inc*. (2009) 46 Cal.4th 247, 264.) "Ordinarily, an appellate court will not consider a claim of error if an objection could have been, but was not, made in the lower court. [Citation.] The reason for this rule is that '[i]t is both unfair and inefficient to permit a claim of error on appeal that, if timely brought to the attention of the trial court, could have been easily corrected or avoided.' [Citations.] '[T]he forfeiture rule ensures that the opposing party is given an opportunity to address the objection, and it prevents a party from engaging in gamesmanship by choosing not to object, awaiting the outcome, and then claiming error.' [Citation.]" (*People v. French* (2008) 43 Cal.4th 36, 46.)

"[A]pplication of the forfeiture rule is not automatic. [Citations.]" (*In re S.B.* (2004) 32 Cal.4th 1287, 1293 (*S.B.*).) "[A]n appellate court may review a forfeited claim—and '[w]hether or not it should do so is entrusted to its discretion.' [Citations.]" (*In re Sheena K*. (2007) 40 Cal.4th 875, 887, fn. 7.) "But the appellate court's discretion to excuse forfeiture should be exercised rarely and only in cases presenting an important legal issue. [Citations.]" (*S.B., supra,* at p. 1293.)

Appellant's due process claim was not preserved for review on appeal. Objections of prosecutorial misconduct are generally forfeited absent a timely objection and a request for an admonition. (*People v. Friend* (2009) 47 Cal.4th 1, 29.) Appellant did not

object to the prosecutor's comments regarding the assault or to the probation report on the ground that it misrepresented that the assault conviction was a strike. Thus, appellant is not in the position to argue that the overruling of an objection "had the additional legal consequence of violating due process." (*People v. Partida* (2005) 37 Cal.4th 428, 435.)

We are simply not persuaded that, as a matter of discretion, we should reach appellant's due process claim despite his failure to object below.

3. *No Merit to Due Process Claim*

In any event, appellant's due process claim is without merit.

The United States Supreme Court has "sustained due process objections to sentences imposed on the basis of 'misinformation of constitutional magnitude.' *United States v. Tucker*, *supra*, at p. 447; see *Townsend v. Burke* (1948) 334 U.S. 736, 740-741 (1948)." (*Roberts v. United States* (1980) 445 U.S. 552, 556.) In *Tucker*, "the sentencing judge gave specific consideration to [Tucker's] previous convictions before imposing sentence upon him" even though "two of those convictions were wholly unconstitutional under *Gideon v. Wainwright* 372 U.S. 335 [(1963)]" (*Tucker*, *supra*, 404 U.S. at p. 447, fns. omitted) since they had been obtained in violation of the constitutional right to counsel. (*Id*. at pp. 444-445, 449.) Thus, the sentence was "founded at least in part upon misinformation of constitutional magnitude." (*Id*. at p. 447.) The United States Supreme Court concluded that resentencing was required to prevent "[e]rosion of the *Gideon* principle." (*Id*. at p. 449.)

In *Townsend v. Burke*, *supra*, 334 U.S. 736 (*Townsend*), the petitioner, who had not been represented by counsel at the time he entered his pleas, had pleaded guilty to two charges of robbery and two charges of burglary. (*Id*. at p. 737.) In sentencing him, the court relied on an earlier charge that had been dismissed and two charges of which petitioner had been found not guilty. (*Id*. at p. 740.) The United States Supreme Court reversed the Supreme Court of Pennsylvania's denial of habeas corpus relief. (*Id*. at pp. 737, 741.) The court explained: "[W]hile disadvantaged by lack of counsel, this

prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue. Such a result, whether caused by carelessness or design, is inconsistent with due process of law, and such a conviction cannot stand." (*Id.* at pp. 740-741.) It stated: "In this case, counsel might not have changed the sentence, but he could have taken steps to see that the conviction and sentence were not predicated on misinformation or misreading of court records, a requirement of fair play which absence of counsel withheld from this prisoner." (*Id.* at p. 741.)

In the context of a criminal trial, the United States Supreme Court has also determined that the state may not knowingly use false evidence, including false evidence pertaining to witness credibility, or knowingly allow such false evidence to stand uncorrected. (*Napue v. Illinois* (1959) 360 U.S. 264, 269 (*Napue*); see *Perry v. New Hampshire* (2012) 565 U.S. __, __ [132 S.Ct. 716, 723]; *Mooney v. Holohan* (1935) 294 U.S. 103, 112 [a state's "presentation of testimony known to be perjured" to procure conviction is "inconsistent with the rudimentary demands of justice"].)

On appeal, appellant has not shown that the court's ruling on his petition was "founded at least in part upon misinformation of constitutional magnitude." (*Tucker*, *supra*, 404 U.S. at p. 447.) It is undisputed that appellant was represented by counsel in the section 1170.126 proceedings below, and his counsel had the opportunity to correct any inaccuracies. The appellate record does not establish that the prosecutor deliberately and knowingly misrepresented the nature of the assault rather than misremembered or confused the circumstances. Likewise, there is no evidence that the probation officer who prepared the probation report deliberately misrepresented that appellant's prior assault conviction was a strike. Appellant has not shown that the state permitted evidence, known to be false, to stand uncorrected.[13]

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[13] Our 2002 opinion (case No. H021026) indicated that appellant was convicted of violating former section 245, subdivision (a)(1). Under former section 245, subdivision (continued)

Appellant cites *People v. Eckley* (2004) 123 Cal.App.4th 1072 (*Eckley*) in support of his due process claim. In *Eckley*, the trial court relied "on sentencing documents (a probation report, two psychological reports, and a letter from a prison administrator) containing material, factual misstatements" (*id*. at p. 1074), and the People essentially conceded on appeal that the evidence being challenged was factually incorrect and material. (*Id*. at 1081.) An appellate court concluded that "the inaccuracies in the four sentencing documents require that the sentence and denial of probation be vacated." (*Ibid*.)

The appellate court in *Eckley* explained its conclusion: "Although not all the procedural safeguards required at trial also apply in a sentencing or probation hearing, such a hearing violates due process if it is fundamentally unfair. (*People v. Peterson* (1973) 9 Cal.3d 717, 726.) 'Reliability of the information considered by the court is the

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(a)(1), "[a]ny person who commit[ted] an assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury" was guilty of a crime. (Stats. 1993, ch. 369, § 1, p. 2168.) The Supreme Court had previously held that, "[a]s used in [former] section 245, subdivision (a)(1), a 'deadly weapon' is "any object, instrument, or weapon which is used in such a manner as to be capable of producing and likely to produce, death or great bodily injury.' [Citation.]" (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028-1029 (*Aguilar*).) In *Aguilar*, the court stated: "[A] 'deadly weapon' within the meaning of section 245 must be an object extrinsic to the human body. Bare hands or feet, therefore, cannot be deadly weapons." (*Id*. at p. 1034.) But it also observed that "some footwear, such as hobnailed or steel-toed boots, is capable of being wielded in a way likely to produce death or serious injury, and as such may constitute weapons within the meaning of section 245, subdivision (a)(1)." (*Id*. at p. 1035.) In our 2002 opinion, this court concluded that the prosecutor's argument, that appellant's kick (with a booted foot) to the victim's head while she was driving constituted use of a deadly weapon, did not require reversal of the assault conviction because the argument as a whole made clear that to convict appellant, the jury had to find there was force likely to cause great bodily injury. The probation report in this case did not mention that appellant was wearing boots or refer to any deadly weapon. The probation report did not indicate that appellant had been convicted under the deadly weapon prong of former section 245, subdivision (a)(1), or that the assault had produced great bodily injury.

key issue in determining fundamental fairness' in this context. (*People v. Arbuckle* (1978) 22 Cal.3d 749, 754-755.) A court's reliance, in its sentencing and probation decisions, on factually erroneous sentencing reports or other incorrect or unreliable information can constitute a denial of due process. In *Townsend v. Burke* (1948) 334 U.S. 736, 741, a defendant 'was sentenced on the basis of assumptions concerning his criminal record which were materially untrue.' This was 'inconsistent with due process of law' and required reversal." (*Eckley, supra*, 123 Cal.App.4th at p. 1080.) The appellate court also pointed out that the challenged evidence exaggerated the defendant's callousness and that the court emphasized defendant's callousness in making its sentencing decisions. (*Id*. at p. 1081.)

Eckley overlooked a key circumstance in the *Townsend* decision, which was that the petitioner had no legal representation when the court sentenced him. Unlike the defendant in *Eckley*, appellant was represented by counsel during the proceedings on the petition for resentencing. Unlike *Eckley*, any misinformation from the prosecutor was presented in argument and was not part of the evidence submitted to the court. Also, unlike *Eckley*, the trial court did not demonstrably rely on the alleged misinformation.

There is nothing in the appellate record to suggest that the court accepted or relied upon the prosecutor's comments about the assault conviction, which were not evidence, or that it understood the probation report to be asserting that the assault conviction was a strike and relied upon that supposed fact in denying the petition.

The probation report's statement concerning appellant's "two prior strike convictions" was ambiguous since it listed three convictions, including the assault. But the ambiguity could be readily resolved by reviewing the conviction's underlying facts, which were set forth in the report. The probation report disclosed that appellant kicked the assault victim in the head while she was driving him to the county jail and that she suffered injury short of great bodily injury. (See CALCRIM No. 875, *Covino, supra*, 100 Cal.App.3d at p. 668.) We can presume that the court read the probation report, that it

was familiar with the applicable law concerning whether an assault qualifies as a strike, and that it properly applied those laws in assessing whether the assault conviction qualified as a strike. (See Evid. Code, § 664 [presumption that "official duty has been regularly performed"]; *People v. Coddington* (2000) 23 Cal.4th 529, 644 (*Coddington*), overruled on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13 [presumption that court knows and applies the correct statutory and case law].)

The other cases cited by appellant are not helpful to his due process argument. In *United States v. Messer* (9th Cir. 1986) 785 F.2d 832, the Ninth Circuit Court of Appeals stated: "[W]hen a trial judge relies on materially false or unreliable information in sentencing, the defendant's due process rights are violated. [Citation.] A defendant challenging information used in sentencing must show such information is (1) false or unreliable, and (2) demonstrably made the basis for the sentence. [Citations.]" (*Id*. at p. 834.) Here, the trial court was not sentencing appellant. In any event, the record before us does not disclose that any of the purported misinformation was demonstrably the basis for the court's denial of appellant's petition.

In *United States v. Corral* (9th Cir. 1999) 172 F.3d 714, the government conceded on appeal that hearsay was not sufficiently reliable for the court to rely on it in sentencing. (*Id*. at p. 715.) "[T]he probation officer's recommendation expressly was based partly on it." (*Ibid*.) "The judge accepted the probation officer's recommendation made in reliance on [the unreliable hearsay]." (*Id*. at p. 716.) The circumstances here are not analogous to those in *Corral*.

United States v. Safirstein (9th Cir. 1987) 827 F.2d 1380 did not involve "misinformation placed before the trial judge," but rather involved the trial court's groundless inference that the defendant had participated in a crime with which he was not charged. (*Id*. at p. 1385.) In *Safirstein*, the Ninth Circuit Court of Appeals recognized that "a court violates due process when it makes assumptions about a defendant's criminal record which are materially untrue, and which the defendant has no opportunity

to correct due to the lack of counsel. *Townsend v. Burke*, 334 U.S. 736, 740-41 (1948)." (*Id*. at p. 1385.) The Ninth Circuit reasoned: "A sentence must be vacated if the district court demonstrably relies upon false or unreliable information. *Farrow v. United States*, 580 F.2d 1339, 1359 (9th Cir.1978) (en banc). Unreasonable inferences and material assumptions which find no support in the record fall within the ambit of [this] rule. [Citation.]" (*Id*. at p. 1387.) Appellant has not shown that the trial court made any groundless inference or assumption upon which it demonstrably relied in denying his petition.

People v. Cruz (1964) 61 Cal.2d 861, 868 (*Cruz*), and *People v. Woodard* (1979) 23 Cal.3d 329, 341 (*Woodard*), which appellant cites, do not support his argument. No due process claim was raised in those cases, and the Supreme Court determined that the erroneous admission of evidence over objection or a motion to exclude was prejudicial under state law. (*Cruz*, *supra*, at pp. 862, 867-868; *Woodard*, *supra*, at pp. 334, 339-342.)

Based on the record before us, appellant has failed to demonstrate a violation of due process.

E. *Ineffective Assistance of Counsel Claim*

Appellant contends that he received ineffective assistance of counsel because his counsel failed to correct material misstatements regarding the magnitude and seriousness of his criminal history. He specifically contends that his counsel rendered ineffective assistance by (1) failing to inform the court that his assault conviction was not a strike because it did not involve use of a deadly weapon and there was no finding of great bodily injury; (2) failing to "rebut the prosecution's assertion that the assault caused great bodily injury"; (3) failing to "rebut the prosecution's assertion that the assault caused the victim to suffer a broken nose"; (4) failing to "rebut the prosecution's contention that the assault was executed because the victim intended to testify against him"; (5) failing to "rebut the prosecutor's assertion [that] appellant had used force to intimidate a witness";

and (6) failing to explain to the court that "six of the seven arson convictions . . . likely were unfounded" and "the single fire" started by appellant "should have resulted in a single arson conviction."[14]

To prevail on an ineffective assistance of counsel claim, a defendant must satisfy a two-part test by establishing both counsel's deficient performance and prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687 (*Strickland*).) As to deficient performance, a defendant "must show that counsel's representation fell below an objective standard of reasonableness" measured against "prevailing professional norms." (*Id*. at p. 688.) The prejudice prong requires a defendant to show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Id*. at p. 694.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Ibid*.)

"In assessing prejudice under *Strickland*, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. [Citations.] Instead, *Strickland* asks whether it is 'reasonably likely' the result would have been different. [Citation.] This does not require a showing that counsel's actions 'more likely than not altered the outcome,' but the difference between *Strickland*'s prejudice standard

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[14] Our 2002 opinion (case No. H021026) indicates that appellant represented to us that six of his seven arson convictions were stayed under section 654. In dictum, the opinion, citing section 451.1, suggested that the Legislature had not intended arson damaging multiple structures, such as had occurred in appellant's case, to give rise to multiple counts of arson. Section 451.1, which was added in 1994 (Stats.1994, ch. 421, § 2, pp. 2299-2300), provides for sentence enhancements of arson convictions under specified circumstances, including where "[t]he defendant proximately caused multiple structures to burn in any single violation of Section 451." (§ 451.1, subd. (a)(4).) This court issued an order to show cause why habeas relief should not be granted on grounds of ineffective assistance of counsel based on, inter alia, defense counsel's failure to argue at sentencing on the assault and witness intimidation convictions that six of appellant's prior strike convictions of arson should be stricken.

and a more-probable-than-not standard is slight and matters 'only in the rarest case.' [Citation.] The likelihood of a different result must be substantial, not just conceivable. [Citation.]" (*Harrington v. Richter* (2011) 562 U.S. 86, 111-112.)

The United States Supreme Court has made clear that "[t]he object of an ineffectiveness claim is not to grade counsel's performance" and "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . , that course should be followed." (*Strickland*, *supra*, 466 U.S. at p. 697.) It is unnecessary to "address both components of the inquiry if the defendant makes an insufficient showing on one." (*Ibid.*)

Even if appellant's counsel should have corrected any misstatements to ensure there was no misunderstanding of his criminal history, we find that appellant has not shown the prejudice essential to establishing an ineffective assistance of counsel claim. Appellant's criminal record spans almost his entire lifetime and goes back decades. It includes 15 adult felony convictions, a multitude of misdemeanor convictions, repeated incarceration, and many violations of parole and probation.

Appellant does not dispute that he has seven arson convictions (and a burglary conviction) arising from his 1991 conduct. As to the gravity of those arson convictions, the probation report indicated that the court sentenced appellant to a six-year prison term, which we note was the upper term for a conviction of arson of a structure. (Stats. 1990, ch. 63, § 1, p. 424 [former § 451, subd. (c)].) The probation report made clear that those arson convictions were later determined to constitute a single strike (see fn. 13, *ante*) and appellant was resentenced on his assault and witness intimidation convictions accordingly.

Appellant does not claim that the probation report inaccurately described the assaultive behavior of which he was convicted. The prosecutor's remarks about the assault were not evidence, and the trial court did not demonstrably rely on them. The probation report's description of the facts underlying the assault conviction indicated that

it was not a strike, and we presume that the trial court reviewed the report and understood and correctly applied the law. (Evid. Code, § 664; *Coddington*, *supra*, 23 Cal.4th at p. 644.) That assault conviction and appellant's subsequent battery of another inmate showed appellant is capable of violence.

Appellant was ultimately sentenced to a 10-year term for his 1999 crimes of assault and witness intimidation under the Three Strikes law. Following his release from prison and apparently while still on parole, he committed another felony: possession of methamphetamine. Although appellant was initially granted probation for his conviction of possession of methamphetamine and given the opportunity to avoid a sentence as a three strike-offender and to receive treatment, he violated probation and was sentenced to prison. There was no evidence that appellant had made any progress toward rehabilitation over the years, despite repeated incarceration.

Based on the record, which showed unremitting recidivism, there is not a reasonable probability that the result of the proceeding would have been different if appellant's counsel had corrected the prosecutor's misstatements and clarified that the assault conviction was not a strike under the Three Strikes law. (*Strickland*, *supra*, 466 U.S. at p. 694.)

F. *Cumulative Impact of the Alleged Errors*

Appellant contends that the cumulative prejudice resulting from the alleged errors, considered individually and together, renders the adjudication of his petition fundamentally unfair and compels reversal of the court's order denying the petition. We have rejected each of appellant's claims. The cumulative impact of the alleged errors did not deprive him of a fair hearing on his petition or his right to due process of law.

DISPOSITION

The order denying the petition for resentencing under section 1170.126 is affirmed.

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ELIA, J.

I CONCUR:

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PREMO, J.

People v. Mizner
H040421

RUSHING, P.J., Dissenting

I respectfully dissent. I have written on this subject extensively, though the only opinion I am at liberty to cite is *People v. Cordova* (2016) 248 Cal.App.4th 543, review granted August 31, 2016, S236179 (*Cordova*); see Cal. Rules of Court, rule 8.1105(e); cf. former Cal. Rules of Court, rules 8.1105(e)(1), 8.1115(a).) I believe that decision adequately addresses most of the points relied upon here by the majority. I offer a few additional comments, however, in response to what I perceive as relatively new points.

All legal controversies may be viewed as contests between competing narratives. Here, according to the majority, when the drafters of Proposition 47 drew up Penal Code section 1170.18, they *accidentally* declared its definition of dangerousness applicable "throughout this Code." (*Id*., subd. (c) (§ 1170.18(c).) What they really meant to say, according to this narrative, was "in this act." I find this narrative implausible on its face because it supposes that the drafters not only chose the wrong noun ("code"); they also chose a preposition ("throughout") that assumes multiple occurrences—a further malapropism, since Proposition 47 uses the defined phrase only once outside the definition itself.

Perhaps out of recognition that this version of events is less than convincing, the majority hastens to bolster it by attributing "absurd results" to the drafters' supposed "error." As nearly as I can tell, the result so denounced is the placement of constraints on the discretion judges formerly enjoyed to deny relief under Proposition 36 on grounds of dangerousness. The language at issue does indeed have this effect. That is its very purpose. (See *Cordova*, *supra*, 248 Cal.App.4th at pp. 571-572, review granted.) But how or why this effect might be found "absurd" is never intelligibly explained.

As potentially applicable to legislation, "absurd" means "*ridiculously unreasonable*, unsound, or incongruous." (Merriam-Webster's Collegiate Dict. (10th ed. 1999) p. 5, italics added.) An "absurd" consequence justifies a judicial departure from literal statutory meaning only because it indicates that lawmakers *cannot* have meant to bring about the consequence in question. (See *Sterling Park, L.P. v. City of Palo Alto*

(2013) 57 Cal.4th 1193, 1203 [interpretation "would lead to absurd results the Legislature cannot have intended"]; *Fireman's Fund Ins. Co. v. Superior Court* (2011) 196 Cal.App.4th 1263, 1281, fn. omitted ["We cannot conclude that our Legislature intended such absurd results."]; *Simmons v. Ghaderi* (2008) 44 Cal.4th 570, 586 ["[J]udicial construction is not permitted unless the statutes cannot be applied according to their terms or doing so would lead to absurd results, thereby violating the presumed intent of the Legislature."].) A court cannot characterize a statutory effect as "absurd" merely because it dislikes it or disagrees with the policy premises on which it rests. Certainly a law's effects are not "absurd" merely because they alter the effect of earlier enactments. To assert otherwise is to accuse lawmakers of acting "ridiculously unreasonabl[y]" every time they amend a statute.

In short, I find the majority's narrative to be at odds with both legal and factual reality. My own narrative, which I believe is firmly grounded in historic fact and settled law, proceeds as follows: The drafters of Proposition 47 were able lawyers and law students interested in criminal justice reform.[1] In drafting that measure, they were well

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[1] One of the official proponents of Proposition 47 was George Gascón, the San Francisco District Attorney. (George Gascón, Letter to Office of the Attorney General, Dec. 14, 2013, available at <https://oag.ca.gov/system/files/initiatives/pdfs/13-0060%20%2813-0060%20%28Neighborhood%20and%20School%20Funding%29%29.pdf?> (as of Dec. 4, 2016); Ballot Pamp., General Elec. (Nov. 4, 2014), argument in favor of Prop. 47, p. 38.) Another article identifies Lenore Anderson, executive director of Californians for Safety and Justice, as an author. (Chang, et al., Unintended consequences of Prop. 47 pose challenge for criminal justice system, L.A. Times (Nov. 6, 2015), available at <http://www.latimes.com/local/crime/la-me-prop47-anniversary-20151106-story.html> (as of Dec. 4, 2016).) According to that organization's website, she was formerly "Chief of Policy and Chief of the Alternative Programs Division at the San Francisco District Attorney's Office," where among other things she "crafted local and state legislation." (Californians for Safety and Justice, Our Staff, <http://www.safeandjust.org/About-Us/ourteam> (as of Dec. 4, 2016).)

It also appears that the Stanford Justice Advocacy Project (SJAP)—an officially recognized student organization at Stanford Law School—contributed to the drafting of the measure. (Ho, Prop. 47: Deep split over law reducing 6 felonies to misdemeanors— (continued)

aware of Proposition 36 and with how its resentencing provisions had fared in the courts. Their adoption of a more stringent test of dangerousness than the one provided in the earlier measure implies a perception that the earlier test had granted judges too much latitude, resulting in too many denials of relief based on marginal, equivocal, or generic evidence of dangerousness.[2] Such denials thwarted the common purpose of both measures, which was to correct for some of the excessive incarceration produced by past "tough-on-crime" measures.[3] There can be no doubt that the drafters intended to avoid

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S.F. Gate (Nov. 5, 2015), available at <http://www.sfgate.com/crime/article/S-F-district-attorney-defends-Prop-47-which-6614091.php> (as of Dec. 4, 2016); Romano, et al., Proposition 47 Progress Report: Year One Implementation (Oct. 2015), p. 1, available at <https://www-cdn.law.stanford.edu/wp-content/uploads/2015/10/Prop-47-report.pdf> (as of Oct. 18, 2016). [according to its Director, SJAP "was involved in the drafting of Proposition 47"]; Organizations Archive – Stanford Law School, <https://law.stanford.edu/organizations/?first_letter=J&page=1> (as of Dec. 4, 2016) [guide to student organizations on school website].)

[2] This case appears to provide yet another illustration of this syndrome. As summarized by the majority, the trial court's denial of relief rested on "appellant's 'extensive criminal conviction history,' 'the nature of the crimes committed,' and 'his inattentiveness to rehabilitation' in prison.' " (Maj. Opn. at p. 6.) But every third-strike prisoner has necessarily been convicted of at least two serious or violent felonies, and a great many of them can be described as having an "extensive criminal conviction history." As for "the nature of the crimes committed," it is difficult to guess what this phrase refers to. It is true that defendant committed several violent or highly dangerous offenses many years ago. Much the same could be said of most, if not virtually all, third-strike inmates. The crime for which defendant is actually serving a life sentence is possession of methamphetamine, an offense viewed by the public as so un-dangerous that voters first eliminated it as a basis for a third-strike conviction in Proposition 36, and then reduced it to a misdemeanor in Proposition 47. It is equally difficult to know what the court meant by defendant's "inattentiveness to rehabilitation," but I fail to see how this factor standing alone supports an inference that resentencing him, at the age of 54 (now 57), would pose an unreasonable danger to society.

[3] Specifically, Proposition 36 restricted the application of the "Three Strikes" law, while Proposition 47 reduced many offenses from felonies (or "wobblers") to straight misdemeanors. Both measures were argued to the voters largely on the basis of their fiscal benefits. In this regard, it bears noting that the life expectancy of a generic 57-year old male is something like 28 years. Using the low-end estimate for the annual costs of (continued)

repeating the mistake of granting trial judges more latitude than necessary to prevent the release of truly dangerous prisoners. And there was no reason for them to merely learn from this mistake when Proposition 47 provided an opportunity to *correct* it as well. To carry out this remedial intention, they (1) copied the operative language from Proposition 36; (2) assigned a new and considerably narrower *meaning* to that language, and (3) declared this definition applicable "throughout this Code." Since Proposition 36 was the only other place where the defined language appeared, this phrase unmistakably conveyed their intention that the new definition would apply to petitions heard under both measures.

To suggest that this was a *drafting* error is, in my view, insupportable. There is every reason to believe that the drafters knew exactly what they were doing, and *no* reason to suppose otherwise.[4] The majority resorts to the notion of a drafting error not

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incarceration, today's decision could cost taxpayers upwards of $1.4 million. (See *Cordova, supra,* 248 Cal.App.4th at pp. 574-575, review granted.)

[4] Ironically, Proposition 47 does contain a real mistake in drafting—an omitted "as" in a clause stating that resentencing shall take place "pursuant to Sections 11350, 11357, or 11377 of the Health and Safety Code, or Section 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code, [as] those sections have been amended or added by this act." (Pen. Code, § 1170.18, subd. (b).) This is the sort of gaffe that courts are empowered to correct under the rubric of "drafting error." (See, e.g., *Szold v. Medical Bd. of California* (2005) 127 Cal.App.4th 591["or" replaced by "of" as bill progressed]; *People v. Superior Court (Blanquel)* (2000) 85 Cal.App.4th 768, 771 [accidental omission of cross-references to predecessor statutes in course of a complex reorganization of portion of code]; *People v. Alexander* (1986) 178 Cal.App.3d 1250, 1265 [inadvertent temporary omission of sanctions for selling PCP "in the 'hurry and confusion' of major legislative activity involving changes in over 100 statutes"]; *In re Chavez* (2004) 114 Cal.App.4th 989, 994, 998 [correction of earlier statute adopting indeterminate sentence was intended to operate retroactively to defendant's benefit, where adoption had been result of attempt to conform to federal law on tangentially related subject matter]; cf. *In re Gabriel G.* (2005) 134 Cal.App.4th 1428, 1436 [refusing to deny effect to statutory language as "inadvertent" merely because it produced consequences Legislature might not have intended]; *People v. Garcia* (1999) 21 Cal.4th 1, 4, 6 [refusing to base construction of provision of Three Strikes law on posited " 'drafting oversight' " or " 'drafting error' " as manifested in a supposed discrepancy between two otherwise redundant provisions of the Three Strikes law]; *id.* at p. 6, italics added ["Although we may properly decide upon (continued)

because that concept fits the facts, but because there is *no* existing rule of law that fits these facts and that can justify the judicial unwillingness—which, sadly, is not confined to this court—to give effect to this statute. The fictive notion of a "drafting error" is just one of several deficient rationales that have been adopted by this and other courts to clothe their reluctance to apply these measures according to their plain terms.

The opponents of Proposition 47 did not share this reluctance. They pounced upon the proposed reduction in trial court discretion under Proposition 36's dangerousness standard as a prime reason to vote against Proposition 47. (See *Cordova*, *supra*, 248 Cal.App.4th at pp. 560-562, review granted.) And they succeeded in publicizing this view even though they elected not to include it among their ballot arguments. (*Id.* at pp. 562-564.)

It is impossible to know how many voters were subjectively aware of Proposition 47's remedial effect on Proposition 36 when they cast their ballots. But that is not a question with which this court should or can properly concern itself. The language the voters enacted into law has an unmistakable meaning. In the absence of some truly compelling reason to depart from that meaning—a reason respecting, among other things, the constitutional barrier against judicial encroachment upon the legislative power—it is simply not within our province to do other than apply the statute as it is written. Because the presumption against retroactivity is no impediment to its application (see *Cordova*, *supra*, 248 Cal.App.4th at pp. 569-578, review granted), we should reverse with instructions to reconsider appellant's petition in light of the dangerousness standard prescribed by Penal Code section 1170.18(c).

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such a construction or reformation when *compelled by necessity* and *supported by firm evidence of the drafters' true intent* [citation], we should not do so when the statute is reasonably susceptible to an interpretation that harmonizes all its parts without disregarding or altering any of them."].)

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RUSHING, P.J.

People v. Mizner
H040421